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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the legislative review procedures set forth in Section 202(c) of the Natural Gas Policy Act of 1978 constitute "necessary and proper" means of executing the legislative power of Congress over commerce in natural gas, and are consistent with the letter and spirit of other provisions of the Constitution.

2. Whether Section 202(c) of the Natural Gas Policy Act of 1978 is severable from other provisions of Section 202.

3. Whether a federal court, having invalidated the sole provision of a statute by which an administrative rule-proposal can become effective, has power to declare the rule-proposal effective by its own fiat.

4. Whether private parties have Article III standing to challenge the constitutionality of Section 202(c), pursuant to which the House of Representatives disapproved by resolution a proposed administrative rule that might have benefited the private parties.

5. Whether, under Article III, an inter-Branch constitutional controversy can be resolved by a federal court in a proceeding where the contending Branches appear only as *amici curiae*.

6. Whether a controversy over the execution of the Necessary and Proper Clause constitutes a nonjusticiable political question.

7. Whether a judical review proceeding is moot where the administrative rule under review has never become effective as a matter of law.

PARTIES BELOW

There were three petitioners in the proceedings below: Consumers Energy Council of America, Consumer Federation of America, and Public Citizen.

The sole party respondent was the Federal Energy Regulatory Commission.

The United States participated as *amicus curiae* in support of the petitioners.

There were seven intervenors in support of the respondent: Petrochemical Energy Group, Process Gas Consumers Group, American Gas Association, Georgia Industrial Gas Group, American Iron and Steel Institute, Interstate Natural Gas Association of America, and United Distribution Companies.

The United States House of Representatives and the United States Senate participated as *amici curiae* in support of the constitutionality of Section 202(c) of the Natural Gas Policy Act of 1978.

After judgment, the United States, the House and the Senate were granted leave to intervene by the court below.

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UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The United States House of Representatives, acting through the Speaker of the House pursuant to H. Res. 49, 97th Cong., 1st Sess., 127 Cong. Rec. H260 (daily ed., Jan. 29, 1981), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on January 29, 1982, in proceedings there captioned *Consumer Energy Council of America, et al.* v. *Federal Energy Regulatory Commission*, Nos. 80–2184, 80–2312.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 673 F.2d 425. The opinion is reproduced, as originally issued, in the appendix to the jurisdictional statement filed in a related case before this

Court, No. 81–2008, by the Process Gas Consumers Group, et al. App. 1a–104a.[1]

On May 6, 1980, the Federal Energy Regulatory Commission issued Order No. 80, which contains the rule-proposal in question. Order No. 80 is reported at 45 Fed. Reg. 31622, and is reprinted herein at App. 123a–195a.

On August 1, 1980, the Commission issued an order denying rehearing and revoking the rule-proposal contained in Order No. 80. That order is reported at 45 Fed. Reg. 54741, and is reprinted herein at App. 196a–203a.

On October 2, 1980, the Commission issued an order denying a second petition for rehearing, addressed to the revocation portion of the order of August 1, 1980. The October 2 order is reported at 45 Fed. Reg. 71780, and is reprinted herein at App. 204a–206a.

JURISDICTION

Judicial review proceedings were instituted in the District of Columbia Circuit by the respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen ("CECA").[2] Jurisdiction was grounded on Section 506(a)(4) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3416(a)(4).

On January 29, 1982, the District of Columbia Circuit entered a judgment which (a) adjudged "that the one-house veto provision in section 202(c) of the NGPA is unconstitutional," (b) reversed "the orders of the Federal Energy Regulatory Commission under review," and (c) remanded the cases "to the Commission for further proceedings consistent with the opinion of this Court filed herein this date." App. 208a–209a.

On March 2, 1982, the District of Columbia Circuit entered an order granting the timely "motions of the United States

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[1] References herein to "App." are to the appendix filed jointly by all aggrieved parties in the various proceedings now before this Court growing out of the decision below. This 231-page appendix accompanied the jurisdictional statement filed on April 29, 1982, by the Process Gas Consumers Group, et al., No. 81–2008.

References herein to "C.A.App." are to the appendix filed by the parties in the proceedings before the District of Columbia Circuit.

[2] These three non-profit organizations, respondents before this Court, are referred to collectively herein as "CECA."

House of Representatives, the United States Senate, and the United States for leave to intervene." App. 105a. All three entities had sought intervention solely to acquire standing to pursue their interests as parties before this Court, having appeared before the Circuit only as *amici curiae*.

On March 10, 1982, the District of Columbia Circuit denied a timely petition for rehearing and a suggestion for rehearing *en banc*, filed by the American Gas Association. The Association had been an intervenor in the proceedings below; it filed a timely notice of appeal on March 26, 1982, pursuant to 28 U.S.C. § 1252, and docketed the appeal in this Court on May 24, 1982, No. 81–2171. Three other intervening groups have docketed appeals in this Court, pursuant to 28 U.S.C. § 1252. See Nos. 81–2008, 81–2020, 81–2151. These intervenors also secured a stay of the mandate of the District of Columbia Circuit.

On May 26, 1982, the Chief Justice granted a timely application by the House of Representatives to extend the time for filing this petition for writ of certiorari to and including August 7, 1982. This petition is being filed within that extended time period.

The House of Representatives invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set forth in the appendix now before this Court in these related cases, the following constitutional and statutory provisions, or relevant portions thereof, are deemed pertinent:

1. Article I, Section 1, of the Constitution. App. 222a.
2. Article I, Section 7, Clauses 2 and 3, of the Constitution. App. 222a–223a.
3. Article I, Section 8, Clauses 3 and 18, of the Constitution. App 223a.
4. Article II, Section 1, of the Constitution. App. 223a.
5. Article II, Section 3, of the Constitution. App. 224a.
6. Article III, Section 1, of the Constitution. App. 224a.
7. Section 201 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3341. App. 224a–225a.
8. Section 202 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342. App. 225a–227a.

9. Section 206(d) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3346(d). App. 227a–228a.

10. Section 506(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3416(a). App. 228(a)–231a.

STATEMENT

As the court below observed, this is a controversy that "represents a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. For sixty years "there has been 'a long tug of war between the Executive and Legislative Branches of the Federal Government' over the constitutionality of legislative review devices." App. 48a.

But the story of this particular case is how the Judicial Branch sought to resolve this controversy in favor of the Executive Branch in a proceeding (a) instituted by private parties said to have "an important stake in the resolution of this [inter-branch] issue," App. 47a, and (b) where the Legislative and Executive Branches appeared not as parties but as *amici curiae*. And the story is one that concludes with a judicial decree that the administrative rule in question "shall take effect," App. 104a, absent further agency action, despite the absence of any statutory authorization for such a decree.

A. THE STATUTORY SCHEME

The story begins with the enactment of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301–3342, duly signed into law by President Carter. Title II of that Act requires the Federal Energy Regulatory Commission ("FERC") to implement a so-called "incremental pricing" program under which certain gas acquisition costs incurred by interstate pipelines are collected only from certain industrial users, rather than from residential, commercial and other high-priority users.

The Act provides that the incremental pricing program will be implemented in two phases, Phase I and Phase II. In Phase I, embodied in Section 201, 15 U.S.C. § 3341, FERC is directed to "prescribe and make effective" a rule respecting the costs of natural gas only as to "industrial boiler fuel facilities" as defined by FERC; there is no provision for legislative review of

a Phase I rule.[3] But in Phase II, embodied in Section 202, 15 U.S.C. § 3342, FERC is directed to expand the incremental pricing program to "any industrial facility which is within a category defined by the Commission" and not otherwise exempt. FERC is directed by Section 202(a)(1) to make the expansion no later than 18 months after November 9, 1978, and to do so in the form of "an amendment to the rule required" under Phase I. It is that amendment that constitutes the so-called Phase II rule, which is the center of this litigation.

Unlike the Phase I rule, the Phase II rule does not become effective when issued by FERC. Section 202(a)(2) provides that the Phase II amendment or rule "shall take effect only as provided under subsection (c) of this section." And Section 202(c), the subsection that the court below held unconstitutional, plainly provides that the amending rule "shall take effect" only after a copy of the rule has been submitted to each House of Congress and a specified 30-day period of continuous session of Congress has expired thereafter—"unless during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval."

Section 202(c)(2) further provides that if either House adopts a resolution of disapproval with respect to the Phase II amending rule, FERC may thereafter submit to each House another rule, to take effect only after the same legislative review procedures have been satisfied.

It is noteworthy that no part of Section 202 refers to the Phase II rule to be prescribed by FERC as a "final rule" or as anything other than a "rule" that becomes effective "only as provided under subsection (c)," the legislative review subsection.

B. FERC'S PROPOSED PHASE II AMENDMENT

On May 6, 1980, after holding hearings and receiving comments, FERC issued its proposed Phase II rule amendment, what it called "Final Rule, Subject to Congressional Review." App. 123a. This so-called "final rule" was embraced in FERC's Order No. 80. In the official summary of the rule-proposal, FERC stated (App. 123a):

[3] FERC promulgated Phase I regulations in 1979 in Order No. 49.

The rule is subject to Congressional review and will not become effective if disapproved by either House of Congress. If not disapproved, the rule will expand the scope of the incremental pricing program to all industrial end-users not exempt under the NGPA, and provide that those users of natural gas other than as boiler fuel be permanently subject to incremental pricing surcharges up to the price of high-sulfur No. 6 fuel oil.

Effective date: Such date as represents the ninety-first day following expiration of 30-day Congressional review period if not disapproved by either House.

FERC further made clear at the outset of its rule-proposal (App. 125a) that

> The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. Instead, the Commission is instructed to bring its technical expertise to bear on the design of a workable Phase II rule that can best advance the purposes set by Congress. It is up to the Congress to decide whether this Phase II [rule] submitted meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate.
>
> By virtue of the very [Congressional] review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful choice if the Commission were to offer no rule, or a very narrow rule, for its review. The Congress has reserved to itself the fundamental judgment as to whether an expansion of incremental pricing is consistent with current national priorities.
>
> The Commssion believes that this Phase II rule presents a meaningful choice to the Congress.

C. HOUSE DISAPPROVAL OF THE FERC PROPOSAL

On the same day FERC issued its proposal, May 6, 1980, the rule-proposal was transmitted to Congress as required by

Section 202(c)(1). A resolution of disapproval was quickly introduced in the House (H. Res. 655) and referred to the House Committee on Interstate and Foreign Commerce. On May 12, 1980, the Committee prepared a report entitled "Incremental Pricing of Natural Gas," H. Rep. No. 96–938, 96th Cong., 2d Sess. (1980), reproduced at App. 107a–121a. In that report, the Committee recommended that the resolution of disapproval "do pass." Among the significant comments in the report are the following:

> [1] The Natural Gas Policy Act of 1978 (NGPA) requires the Federal Energy Regulatory Commission to develop and submit to Congress, by May 9, 1980, a proposal for incrementally pricing natural gas sold to industrial nonboiler fuel facilities identified by the Commission. Incremental pricing under the NGPA mandates the allocaton of a portion of the acquisition costs of natural gas to industrial boiler fuel users and requires the Commission, subject to Congressional review, to extend incremental pricing to such other nonboiler industrial users as it deems appropriate. . . . The Commission's proposal will become effective unless it is disapproved by either House of Congress within 30 days (of continuous session) of its submission by the Commision. [App. 107a].
>
> [2] The committee finds that acknowledged uncertainty, current circumstances, and problems raised by the Commission's alternative fuel price mechanism preclude implementation of this rule. [App. 119a].
>
> [3] Accordingly, the committee finds that current uncertainties with respect to Phase II of incremental pricing must be substantially reduced before it would consider implementation of a Phase II rule. The committee accepts the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish market ordering or price sheltering. Current market conditions do not support the need for an expansion of incremental pricing beyond phase I. [App. 119a–120a].
>
> [4] House Resolution 655 does not change any existing law. [App. 120a].

The resolution of disapproval went to the floor of the House on May 20, 1980, where it was adopted 369 to 34. *See* 126 Cong. Rec. H3839–3855. The floor discussion reflected many of the same concerns raised by the Committee. For the most part, the supporters of the resolution believed that FERC's proposal was in keeping with the mandate of Congress, but that the policy considerations of Phase II had changed since the passage of the Act. *See, e.g.*, H3841, col. 3. Others believed that FERC had not carried out the legislative intent with respect to providing protection for consumers. *See* H3847, H3854. As thus passed, House Resolution 655 reads (App. 222a):

> *Resolved*, That the House of Representatives does not approve the proposed rule under section 202 of the Natural Gas Policy Act of 1978 (relating to incremental pricing of natural gas) a copy of which was transmitted to the Congress on May 6, 1980.

D. REHEARING PROCEEDINGS BEFORE FERC

On June 5, 1980, CECA filed its first application for rehearing of Order No. 80, containing FERC's disapproved rule-proposal. CECA requested FERC to delete the Congressional review language wherever it appeared in Order No. 80, "thereby making the rules effective in accordance with the remaining terms thereof." C.A.App. 1. The basis for the application was said to be that "the Veto Provision, the statute on which it is based, 15 U.S.C. § 3342(c), and the Resolution of Disapproval passed by the House of Representatives on May 20, 1980 (H. Res. 655) are unconstitutional." *Id.*

On August 1, 1980, FERC by order denied CECA's rehearing application. App. 196a–203a. In refusing to pass upon the constitutionality of the Congressional review provisions of the Act, FERC adhered to the view "that sound administrative practice requires the presumption of constitutional validity of statutes entrusted to this Commission for implementation." App. 198a.

In the same August 1 order, FERC also exercised "its authority under sections 201 and 202 to amend the rule under section 201 to revoke the [Phase II] amendments made by Order No. 80." App. 201a. It revoked Order No. 80 even on the

assumption that, if the Congressional review procedure of Section 202(c) were found invalid, the Phase II rule-proposal could take effect. It did so for a variety of reasons: (a) FERC itself, in submitting the proposal to Congress, had made no evaluation of the social and economic goals of Phase II, believing that Congress had that responsibility; (b) Order No. 80 thus was not "the product of reasoned decision-making and the Commission is neither authorized nor required to place it into effect" (App. 199a); (c) even were FERC to make an independent social and economic evalaution, "we believe as an initial matter that we might well have very serious reservations as to the wisdom of making the Phase II rule effective" (App. 199a–200a); (d) the proposed rule does not "appear to be capable of carrying out the market ordering function of incremental pricing . . . [and] might be an imperfect instrument for sheltering high-priority users from the economic impacts of rapidly increasing natural gas prices" (App. 200a). Finally, FERC determined that a variety of imponderables, "and other major social and economic issues raised by Order No. 80, simply must be addressed, and a reasoned judgment reached upon them, before the rule takes effect." App. 201a.

CECA then sought rehearing of that portion of FERC's August 1 order that revoked Order No. 80. C.A.App. 16. In this second rehearing application, CECA claimed that FERC lacked power to revoke a Phase II rule inasmuch as it was under a statutory mandate to issue such a rule. And it was asserted that the revocation was not in accordance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

On October 2, 1980, FERC issued an order denying rehearing on the revocation issue. App. 204a–207a.

E. CECA'S PETITIONS FOR JUDICIAL REVIEW

The CECA organizations sought judicial review in the court below of the two FERC orders, dated August 1 and October 2, that had denied CECA's two petitions for rehearing. These were deemed to be "final orders" within the meaning of Section 506(a)(4) of the Natural Gas Policy Act, 15 U.S.C. § 3416

(a)(4), which authorizes judicial review at the instance of any person "who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding." Separate petitions for review having been filed as to each denial of rehearing, the petitions (Nos. 80–2184, 80–2312) were consolidated by court order on November 7, 1980.

The CECA organizations claim to represent many individual high-priority consumers of natural gas.[4] They allege that they were aggrieved by the two FERC orders denying rehearing, inasmuch as the effect was to preclude Phase II "incremental pricing rules from going into effect." C.A.App. 1. Those rules, had they become effective, "would have shifted some of the costs of natural gas to industrial users and away from consumers." And, without such rules, "the cost of natural gas to the consumers who are members of the organizations comprising petitioner CECA will be increased thereby." *Id.*

While CECA's ensuing brief on the merits in the court below briefly described the revocation matter in its statement of the case (pp. 19–20), the sole Question Presented was "Is it constitutional for one House of Congress to veto a rule issued by an agency of the executive branch of the federal government?" Brief, p. 2. Or, as CECA asserted in the conclusion of its brief (p. 63), "The crucial question which this Court must answer is whether the Framers intended to permit a single House of Congress the virtually unlimited authority to override a duly enacted statute through the mechanism of vetoing the regulations which are needed to carry it out."

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[4] The three CECA organizations have described themselves as non-profit organizations composed variously of individual and organizational members. The Consumer Energy Council in particular has described itself as "a broad-based coalition of consumer, labor, farm, public power, rural electric cooperative, urban, senior citizen, and low income organizations established to represent the consumer voice in national energy policy, including pricing policies for natural gas." C.A.App. 1.

Many of the individual members and contributors to the three CECA organizations are said to be high-priority consumers of natural gas. In addition, Public Citizen "is also the owner of a building located at 215 Pennsylvania Avenue, S.E., Washington, D.C., which is heated, in part, by natural gas." C.A.App. 2.

The CECA brief then proceeded to present the stock arguments that the legislative review device, as embodied here in Section 202(c) of the Natural Gas Policy Act, exceeds the legislative powers of Congress, violates the general separation of powers doctrine, and deprives the President of the opportunity to exercise his veto power under Article I, Section 7, of the Constitution.[5] No claim was made, however, that Section 202(c) violates any procedural or other constitutional right of CECA or members thereof. The sole constitutional claim was that the constitutional powers of the Executive, and to some extent those of the Judiciary, have been breached by Congress.

Not surprisingly, CECA's constitutional claim was such as to attract the full support of the Executive Branch. Appearing *sub nom.* "United States," the Executive Branch filed a brief *amicus curiae* "to present its views on this important constitutional issue." Brief, pp. 2–3. The Executive Branch expressed its total agreement with CECA's constitutional positions, adding only that Section 202(c) is severable from the other provisions of the Act. The Executive Branch's brief also announced, p. 3, that "we have transmitted a report to each House of Congress providing notification that we will contest the constitutionality of a statute. . . . We would welcome the participation in this case of the Senate and the House of Representatives as *amici curiae*, in order to provide this Court with full argument on the issue of the constitutionality of Section [202(c)]."

The Senate and House responded to this notification that the Executive Branch desired a constitutional confrontation with the Legislative Branch by filing a joint brief *amici curiae*. The two Houses sought to advise the court that Section 202(c) represented a proper exercise of the broad authority of Congress under the Necessary and Proper Clause to provide for a limited kind of delegation of quasi-legislative functions, and that no other provision in the Constitution precluded this

[5] The constitutional arguments advanced on behalf of CECA are identical to those advanced on behalf of Chadha in the *Chadha* cases now pending before this Court for reargument, Nos. 80-1832, 80-2170, 80-2171. Counsel for CECA also represents Chadha.

choice of means of implementing the commerce power. In addition, the two Houses argued that Section 202(c) is not severable from the remainder of the statute, and that FERC's revocation of the Phase II proposal made the review proceedings moot. By leave of court, the two Houses also filed a motion to dismiss on the ground that the case should have been brought in a district court, not in the appellate court under Section 506(a)(4).

In the meantime, the sole party respondent before the court below—FERC—filed a brief taking no position on the constitutionality of Section 202(c). FERC argued that the constitutional issue need not be reached since (a) the Phase II order was but a proposal to Congress, and hence could not stand absent a Congressional mandate of some sort authorizing that it be made effective; (b) FERC in any event had authority to revoke the proposal; and (c) Section 202(c) is inseverable from the remaining Phase II subsections of Section 202.

Various groups of gas utility and related corporations intervened as respondents, basically in support of FERC's statutory positions. Several intervenors also supported the constitutionality of Section 202(c).

CECA addressed the revocation, severability and jurisdictional issues for the first time in its reply brief.

F. THE RULING BELOW

In a wide-ranging 104-page opinion, the court below held "that the revocation order was invalid, that section 202(c) is unconstitutional, and that the Phase II rule should become effective absent further Commission action to postpone or amend it." App. 16a. It rejected every jurisdictional, prudential and constitutional argument put forth by the two Houses in their *amici* capacity, as well as several arguments advanced by proponents of the legislative review device that the two Houses did not see fit to advance.[6]

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[6] The court spent three pages, App. 96a–98a, rebutting certain arguments ascribed to former Senator Javits in a 1977 law review article. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U L. Rev. 455 (1977).

See also App. 52a–54a, n. 127, where the court spends a long footnote critiquing a law review article by Professor Van Alstyne of Duke University School of Law.

The court dismissed any thought that a political question might be present in the case. App. 43a–49a. And it quickly found that the Necessary and Proper Clause "fails to advance the argument on behalf of the one-house veto." App. 52a. The main thesis of the opinion was that Section 202(c) is unconstitutional in that (a) it violates the Presentment Clauses of Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one House of Congress, and (b) it contravenes the separation of powers doctrine implicit in Articles I, II, and II because it authorizes the Congress to share powers properly exercisable only by the other two branches.

Having thus proceeded to invalidate Section 202(c), the court concluded by decreeing that FERC's Phase II proposal "shall take effect," App. 104a, absent "further Commission action to postpone or amend it," App. 16a. The court cited no statutory or other authorization for a judicial declaration of the effectiveness of a Phase II proposal made by FERC, particularly one that FERC itself believes to be unwise and ineffective.

G. THE POST-JUDGMENT INTERVENTIONS

The court below did in fact resolve "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. But since those political branches participated in the proceedings only as *amici curae*, they found themselves in a quandary. They had no standing to take the initiative before this Court to pursue or protect their respective interests. The House and Senate in particular had no assurance that any of the parties opposing CECA in the proceedings below would appeal the constitutional issue, let alone adequately represent the critical concerns of the two Houses.

For those reasons, the House and the Senate, as well as the Executive Branch, sought and obtained leave of court to intervene after judgment. The House and Senate are now in this Court as petitioners. The Executive Branch is here as a party respondent and appellee.

REASONS FOR GRANTING THE WRIT

1. BY UNDULY RESTRICTING THE "NECESSARY AND PROPER" LEGISLATIVE AUTHORITY OF THE CONGRESS, THE DECISION BELOW CREATES "FAR-REACHING EFFECTS ON THE OPERATION OF THE NATIONAL GOVERNMENT"

The two Houses of Congress come to this Court, for the second time within the recent past,[7] to protest a lower court decision that restructures and deprecates the "necessary and proper" legislative powers of Congress.

The decision below touches a matter of profound concern to the Congress and the National Government, as well as to the entire Nation. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819), the ability of Congress to select those means deemed appropriate to the execution of the great powers of government is a matter "on which the welfare of a nation essentially depends." And if that capacity of Congress, embodied in the affirmative grant of legislative power by the Necessary and Proper Clause (Article I, Section 8, Clause 18), be unduly retracted, then the Constitution may indeed become but "a splendid bauble." *Id.*, at 421.

The court below conceded that its decision creates "far-reaching effects on the operation of the National Government." The House submits that those effects are so manifold, so ill-conceived, so destructive of the constitutional design envisioned in *McCulloch* v. *Maryland*, that the reasons for plenary review of the decision below become compelling. In capsule form, the ill effects that must be examined by this Court are:

First. The court below, in addressing the constitutionality of Section 202(c) of the Natural Gas Policy Act, ignores the precepts that all presumptions "are in favor of constitutionality" and that "before a court is justified in holding that the

[7] On June 22, 1981, the House and Senate filed petitions for certiorari to review the ruling of the Ninth Circuit, *Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), holding unconstitutional the legislative review provisions of Section 244(c)(2) of the Immigration and Nationality Act. Nos. 80-2170, 80-2171. Review was granted, and oral argument was had on February 22, 1982, along with the INS appeal in the case, No. 80-1832. On July 2, 1982, the Court restored all three cases to the calendar for reargument.

legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear." *Fairbank* v. *United States*, 181 U.S. 283, 288 (1901).

Here, the "excess or conflict" is anything but clear. More importantly, the failure to accord presumptive validity to Section 202(c) exacerbates the court's refusal (App. 52a) to give serious consideration to Congress' theory of the constitutionality of Section 202(c). The theory is that the Necessary and Proper Clause confers legislative power on Congress to pass laws that delegate and/or retain certain quasi-legislative functions. That theory is a modern manifestation of the principles of *McCulloch* v. *Maryland;* and it is the theory used by the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028, 1057–1071 (Ct. Cls. 1977), *cert. denied*, 434 U.S. 1009 (1978), to validate the legislative review device in the federal Salary Act. The decision below thus directly conflicts with *Atkins* in terms of the use of the "necessary and proper analytical approach to the legislative review device.

Second. The *McCulloch* decision makes clear that the Necessary and Proper Clause is something more than a benign clause, with no role to play in constitutional analysis other than to bring into focus what the court below calls "other constitutional infirmities" (App. 52a). *McCulloch*, as the Court of Claims emphasizes in *Atkins*, establishes that the Clause is an affirmative and independent grant of legislative power, "an additional power, not a restriction on those already granted." 17 U.S. (4 Wheat.) at 420.

In the context of assessing the validity of the legislative review device, the *McCulloch* analytical model requires a court first to ask whether the affirmative thrust of the Clause permits Congress, as part of a duly enacted statute, to retain and exercise some of the quasi-legislative functions that are otherwise delegable to an administrative agency. If the answer is affirmative, then the question is whether any other provision of the Constitution "imperiously" (*Id.*, at 408) prohibits or withholds such "necessary and proper" choice of means. And where the alleged infirmity is an invasion of a function constitutionally

assigned to another branch, there must be a weighing process to determine if the invasion "is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

Third. The court below has significantly recast the infrastructure of legislative power vested in Congress. It has done so in several ways:

(a) It has read Sections 1 and 7 of Article I in such way as to confine the legislative power of Congress to the enactment of plenary legislation, subject to presidential veto.

(b) It has thereby seriously impaired the legislative power implicit in the Necessary and Proper Clause to provide by statute for various ways of performing quasi-legislative functions within that statute.

(c) It has thrown into confusion the doctrine that, by virtue of the Necessary and Proper Clause, Congress can delegate to governmental departments and agencies "the exercise of quasi-legislative authority . . . subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). For if Congress is constitutionally forbidden to engage in the quasi-legislative function of approving or disapproving administrative lawmaking without enacting a new plenary statute each time it so acts, how can administrative agencies be delegated that same function without being subject to the same plenary legislation requirements?

(d) It has failed to recognize the historic distinction between plenary legislation and quasi-legislation. Until now, only plenary legislation has been thought subject to the bicameral processes of Article I, Section 7, while quasi-legislation has been the peculiar concern of the discretionary judgments of Congress in exercise of its "necessary and proper" legislative powers.

(e) The ultimate reorganization attempted by the court below is to read the quasi-legislative aspects of the Necessary and Proper Clause as being overruled by, or inconsistent with, the Presentment Clauses, as well as the separation doctrine. But as was said long ago in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821), it is the duty of a court "so to construe the

constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not permit their seeming repugnancy to destroy each other." The court below made no effort to give effect to the Necessary and Proper Clause, or to reconcile it with the Presentment Clauses or the separation doctrine.

Fourth. In approaching the constitutional problem, the court below repeatedly asserts and assumes that Congress sought to impose legislative review and a "one-House veto" on an otherwise "final" and "effective" order of FERC. See App. 33a, n. 74; 74a–76a. The House emphatically rejects that interpretation of Section 202(c). That section, as well as FERC's Order No. 80 and the House resolution of disapproval, are replete with references to Congressional review of a "proposed rule"—a proposed rule that "shall take effect" only if neither House adopts "a resolution of disapproval" within a specified period after submission. Congress, in other words, has not delegated to FERC the quasi-legislative authority to make effective a Phase II rule. It has only asked FERC to assist the Congress by formulating a proposed rule for Congress to consider. And at no time has FERC acted as though it had authority to finalize its Order No. 80.

Fifth. The court below, in taking away from Congress much of its "necessary and proper" quasi-legislative power, has transferred that power to the Executive Branch. Cast by the court in constitutional concrete, that transfer wreaks havoc with the separation of powers doctrine. By destroying the healthy and growing cooperation between the Legislative and Executive Branches, the court returns to the "archaic view of the separation of powers as requiring three airtight departments of government." *Nixon*, 433 U.S. at 425. In the court's view, Congress is now restricted to enacting plenary legislation, while the Executive has exclusive power to execute plenary statutes as he sees fit. Congress can no longer put conditions or limitations on Executive exercise of delegated quasi-legislative power, save by passing a new plenary statute.

Thus the District of Columbia Circuit succeeds in diluting the Necessary and Proper Clause to the point where it will be

difficult for the Clause's quasi-legislative grant to "be adapted to the various *crises* of human affairs." *McCulloch*, at 415. The decision below serves "to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *Id.*, at 415–416.

The effect of the constitutional principles announced below is to preclude Congress, in implementing the complex economic and social policies of the Natural Gas Policy Act, from instructing FERC "to bring its technical expertise to bear on the design of a workable Phase II rule that can best advance the purposes set by Congress." See App. 125a. The court states that if Congress doesn't like that constitutional block to granting such limited quasi-legislative power to FERC, "it may by statute take it back or may in the future enact more specific delegations." App. 98a. That remark seems to make no sense, governmentally or constitutionally. Why should Congress be forced to legislate on difficult economic and social matters with its "necessary and proper" hands tied behind its back? And what does the Executive hope to gain by corralling all quasi-legislative rulemaking functions within the vested Executive power?

2. THE DECISION BELOW POSES IMPORTANT QUESTIONS AS TO THE SEVERABILITY OF SECTION 202(c) AND THE JUDICIAL POWER TO MANDATE THAT A PROPOSED PHASE II RULE BE MADE EFFECTIVE CONTRARY TO THE STATUTORY SCHEME

The court below misunderstood the critical role that Section 202(c)—the subsection found to be unconstitutional—plays in making a Phase II rule-proposal effective. Section 202(a)(1) authorizes FERC to "prescribe" a Rule II amendment, while Section 202(a)(2) says that such an amendment "shall take effect only as provided" in Section 202(c). And Section 202(c)(1) allows the amendment submitted by FERC to "take effect" in the prescribed 30-day period "unless during such 30 day period . . . either House of the Congress adopts a resolution of disapproval." If such disapproval occurs, as happened here, FERC may not propose another Phase II rule for at least six months (Section 202(c)(2)(B)), and loses all power to

submit a proposed rule after two years (Section 202 (c)(2)(B)).

Several problems emerge from the ruling below severing the whole of Section 202(c), invalidating it, and then decreeing that FERC's Phase II rule-proposal be made effective.

First. There is no severability clause in the Natural Gas Policy Act. How, then, can a court sever and invalidate the sole statutory mechanism for making a Phase II rule-proposal effective? The court below answers that it can sever if it finds that Congress "would have intended" that a Phase II rule be made effective even without the legislative review mechanism of Section 202(c). See App. 21a–30a; *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968); *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

But the cited cases in this Court make clear the inadequacy of that answer. *Buckley*, *Jackson* and *Champlin* all state that reliance on legislative intent to determine severability is appropriate only "if what is left [after severance] is fully operative as a law." In this instance, "what is left" after severing Section 202(c) is inoperative; a Phase II rule amendment authorized by Section 202(a) (1) and (2) can take effect only in accordance with the severed Section 202(c).

Thus the severability problem here is traceable to the lower court's desire to read finality into an administrative order or rule, a finality that the unsevered remainder of the statute will not support. It is the same kind of severability problem that plagued the Ninth Circuit in *Chadha*, now scheduled for reargument before this Court. The severability issue common to both cases can be considered together.

Second. As the Ninth Circuit did in *Chadha* with respect to decreeing cancellation of an INS deportation order, the court below decreed finality to a Phase II rule-proposal. Both courts, having severed and invalidated the only statutory bases for such finalization, can cite no authority for their judicial decrees other than their own fiat.

Such judicial action, unauthorized by statute, amounts to judicial legislation in contravention of the separation of pow-

ers. "Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist." *United States* v. *Union Pacific R. Co.*, 91 U.S. 72, 85 (1875). Certainly, courts have no greater power to decree relief where the omission stems from severance and invalidation of the sole statutory basis for relief. If a court can find no basis for relief in "what is left" in a statute after severance, that should end the matter.

This judicial excess deserves plenary review and correction by this Court. The Congress simply does not want Order No ,80 made effective. FERC does not want it made effective. And nothing in the opinion below purports to assess the economic and social policies that alone can justify putting a Phase II rule into effect.

3. THE DECISION BELOW RAISES IMPORTANT "CASE OR CONTROVERSY" PROBLEMS INVOLVING CONSTITUTIONAL ATTACKS ON THE LEGISLATIVE REVIEW DEVICE

Like the *Chadha* litigation now before the Court, the instant judicial review proceeding poses critical justiciability problems in the context of private party assaults on the constitutionality of the legislative review device in Section 202(c).

First. Do the private parties, the respondent CECA organizations, have standing to institute in federal co[illegible]an inter-Branch controversy over the legislative review device?[6] Can they show, in other words, that they personally "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)?

The answers to those questions are not easy. CECA has not alleged that the proposed Phase II rule created any legal right, "the invasion of which creates standing," *Linda R.S.* v.

[6] While this question is not addressed in the opinion below, the question was raised by Circuit Judge Edwards at oral argument. The court does state, without elaboration, that the private parties have "an important stake in the resolution of this [constitutional] issue." App. 47a.

Richard D., 410 U.S. 614, 617, n. 3 (1973). CECA seems to have suffered no injury other than the disappointment any prospective beneficiary of a proposal suffers when the proposal is not enacted into law. Even that disappointment rises no higher "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College* v. *Americans United*, 102 S.Ct. 752, 765, 70 L.Ed. 2d 700, 718 (1982). Moreover, CECA's disappointment is not the result of "the putatively illegal conduct" of the sole defending party, FERC. CECA's only challenge is to "the putatively illegal conduct" of the Legislative Branch, a factor which leads to a question whether CECA is within "the zone of interests" to be protected by the Presentment Clauses or the separation of powers doctrine. Obviously, these hard questions must be addressed.

Second. The court below correctly observes that this case involves "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. The observation brings into focus the incongruity of resolving that disagreement when the political branches are before the court only in an *amicus* posture.

It is a basic Article III premise that no federal court can pronounce a statute unconstitutional "except as it is called upon to adjudge the legal rights of litigants in actual controversy." *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). That means that the controversy must involve the litigants or the parties to the case. But those who may appear as *amicus curiae* cannot supply the necessary adverseness upon which "the court so largely depends for illumination of difficult constittuional questions." *Id.* To adjudicate controversies between *amici* implicates the advisory opinion doctrine. The court simply did not have before it the actual parties to the controversy.

A variant of this problem is present in the *Chadha* case. There the Ninth Circuit purported to resolve an inter-Branch controversy with only one Branch before the court as a party; the two Houses of Congress appeared only as *amici*. Here, neither Branch is a party. And in both cases the two Houses

find their legislative powers being adjudicated without being allowed to participate fully as a party and to introduce whatever evidence that might support their constitutional arguments.

The House of Representatives protests this judicial permissiveness that allows the constitutional powers of a coordinate Branch to be assessed and resolved on no firmer Article III basis than the appearance of that Branch as *amicus*.*

Third. The court below, like the Ninth Circuit in *Chadha*, rejected the political question doctrine on the ground that a judicial resolution is "appropriate" since there is "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. But the court assumes that the disagreement relates only to the Presentment Clauses and the general separation of powers doctrine. Not so. Properly understood, this case involves a Congressional determination of what is "necessary" and "proper," by way of providing a legislative review mechanism, to implement the vested power of Congress over commerce in natural gas.

The determination of whether a legislative review provision is "necessary and proper" to that end is a matter textually committed to the Legislative Branch. *McCulloch* v. *Maryland*, 4 Wheat. at 423, made clear that for a court to inquire into the degree of necessity or propriety "would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." Recognition that the Necessary and Proper Clause is in essence a political/legislative proposition serves to strengthen its consistency with the Presentment Clauses and the general separation doctrine.

Fourth. Important problems of mootness are raised by the fact that the proposed Phase II rule has never achieved legal effectiveness, and by the fact that FERC took action to revoke that proposal. The court below sought to avoid mootness by rul-

* After the court below rendered its opinion and judgment, the House, the Senate and the Executive Branch obtained leave from the court to intervene in the proceeding. The sole purpose was to allow the two Branches to proceed further in this Court as parties, rather than as *amici*. Such intervention, of course, had no effect on their status as *amici* in the proceeding before the District of Columbia Circuit.

ing that the proposal was really final since the administrative rulemaking process "was at that point complete," App. 33a, n. 74, and that the revocation by FERC did not comply with the APA hearing and comment requirements, App. 31a–36a. And the court added that the "veto of the Phase II rule effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect." App. 74a.

But none of these judicial explanations of the finality of FERC's proposal answers the provision of Section 202(a)(2) that a Phase II proposal "shall take effect" only as provided in Section 202(c). The enigma remains. How can a live controversy be generated over an administrative proposal that, as a matter of law, never became effective?

Were this Court to accept any of the foregoing considerations, it would be unnecessary to enter the constitutional thicket surrounding the legislative veto device.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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